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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 708

FANCHON & MARCO, INC., *Petitioners*,

v.

PARAMOUNT PICTURES, INC., ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Fanchon & Marco, Inc., prays that a writ of certiorari issue to review the judgment entered in this case on November 1, 1951, by the United States District Court for the Southern District of California.

OPINION BELOW

The opinion of the district court is printed at Record p. 123, and is reported at 100 F. Supp. 84.

JURISDICTION

The judgment of the district court was entered on November 1, 1951, and an appeal was taken to the Court of

Appeals on January 5, 1952, where the case is now pending.

The jurisdiction of this Court is based on section 1254 of the Judicial Code. (28 U.S. C.A. sec. 1254.)

QUESTIONS PRESENTED

1. In a private suit under the antitrust laws, in which judgments in a government suit have been received in evidence under section 5 of the Clayton Act, may the district court give to the judgments no real evidentiary value or effect, and correctly decide that the facts of which they are evidence have been overcome and rebutted by evidence of the defendants which is of no factual or legal weight or significance whatever?

2. May a district court in such a case correctly decide that the prima facie effect of such judgments is overcome and negatived merely by general denials of employees of the conspirators who have no knowledge of and have not been participants in the conspiracy?

3. May a district court decide that the prima facie effect of such judgments is overcome and negatived merely by such denials and by a presumption that the defendants discontinued the conspiracy upon entry of the judgments?

4. Does a presumption arise that defendants in a government antitrust suit have discontinued the practices, acts, ownerships and relations prohibited by judgments entered against them, upon entry of the judgments?

5. Does such a presumption arise where the practices, acts, ownerships and relations, or some of them, are not required to be discontinued until long after the entry of the judgments?

6. Whether it is clearly erroneous for a district court to decide that conspiracy and monopolization have ceased to be the cause of restraint of trade and monopoly upon the entry of such judgments, and that individual action has then become the cause, where precisely the same practices,

acts, ownerships and relations have continued without interruption?

7. Whether conspiracy AND unreasonableness AND injury must concur and be shown in a private antitrust suit, where the defendants have unaminously refused to deal with the plaintiff, on the theory that the refusals are necessary on so-called economic and business grounds?

STATEMENT

Petitioner is engaged in the operation and management of motion picture theatres in Los Angeles.

The respondents are:

1. Paramount Pictures, Inc.,
2. Paramount Film Distributing Corporation,
3. Loew's, Incorporated,
4. RKO Radio Pictures, Inc.,
5. Universal Pictures Company, Inc.,
6. Universal Film Exchanges, Inc.,
7. United Artists Corporation,
8. Twentieth Century-Fox Film Corporation,
9. National Theatres Amusement Co., Inc.,
10. Fox West Coast Theatres Corporation.

Respondents Paramount, Loew's, RKO and Fox, with Warner Bros. Pictures, Inc. (which is not a respondent), are the so-called five major motion picture distributors. Together with respondents Universal and United Artists, and Columbia Pictures Corporation (Columbia also is not a respondent), they control and release eighty per cent or more of the feature motion pictures, a substantial part of which is needed to run any motion picture theatre in the United States. National Theatres and Fox West Coast Theatres are engaged in operating motion picture theatres.

On August 10, 1949, petitioner began the operation of a large, newly constructed motion picture theatre at Los Angeles, called the Baldwin theatre. Prior to the opening of

the theatre petitioner made requests of each and all of the eight picture distributors, including respondents, to license feature pictures for first run use with which to open the theatre. (R. 135) All refused. From time to time thereafter until shortly before the trial of this case in 1951, petitioner continued its efforts to procure pictures from the distributors for first run use in the theatre. Every request was denied. The distributors also unanimously refused to license pictures for the theatre except for second run exhibition, subject to a clearance of twenty-one days in favor of the first run exhibitors in the Los Angeles area.

Even though petitioner offered Columbia $250,000 for the picture "Jolson Sings Again," to be played first run in four theatres, including the Baldwin, with seating capacity of 8,290, it was refused, despite the fact that Columbia considered the managerial ability and financial responsibility of petitioner good. Instead, the picture was licensed to RKO for first run showing in two RKO theatres, with but 5,700 seats. The film rental received was much less than $250,000. (R. 175-176, 3461, 3475-3478.)

On May 8, 1950, petitioner filed suit against respondents in the District Court at Los Angeles, and complained that the refusals were pursuant to conspiracy and monopoly in violation of the antitrust laws, and sought an injunction against the refusals and damages resulting from the past deprivation. (R. 3) After a trial without a jury, the complaint was dismissed by judgment entered November 1, 1951. (R. 201-202.) On January 5, 1952, the judgment was appealed to the Court of Appeals for the Ninth Circuit, where the case is now pending.

On April 24, 1952, in *Chorak* v. *RKO*, 196 F. 2d 225, the Court of Appeals approved the decision of the district court in this case, by affirming largely on the basis and citation of that decision, a judgment erroneously upholding a similar unanimous refusal of the respondents to furnish pictures for the theatre of an independent exhibitor. In the *Chorak case* certiorari was denied by this Court on No-

vember 17, 1952, Justices Reed, Black and Douglas dissenting, 73 S. Ct. 186.

There are about 300 theatres in the Los Angeles area, which represent the market for the leasing of pictures from the distributors. About 214 of the theatres are located in Los Angeles proper.

Only for theatres owned by corporations controlled by respondents have licenses for the first exhibition of pictures at Los Angeles been granted by the distributors. This limitation, which began long before the entry of the judgments in the *Paramount Case*, 334 U. S. 131, hereinafter referred to, continued and existed without change at the time of the trial of this case.

There were about thirty-three theatres in this preferred group, distributed in ownership as follows: Fox Film, through control of Fox West Coast Theatres, from 22 to 24 theatres; Warner, three; RKO, two; United Artists, two, and Paramount, two. (R. 175-176, 184, 575-581)

As stated by this Court in *United States* v. *Paramount*, 334 U. S. 131, 167, the first runs yield the "cream" of the business; and in Los Angeles about two-thirds of the total admissions are received by the first run theatres.

Of all the theatres in the Los Angeles area, first and subsequent run, about 250 were controlled by respondent Fox West Coast Theatres. (R. 127) The rest of the subsequent run theatres were scattered among many independent exhibitors.

For theatres in the Los Angeles area, the distributors for many years have enforced a classification as to the run for which each shall receive pictures (as on first run, second run and so on), and as to the clearances appertaining to the several runs. Few, if any, of the theatres, except those of respondent Fox West Coast, have received pictures for any run better than that for which it has been classified.

In the system of classification, three clearances have applied in favor of the first run against the second run theatres—7, 14 and 21 days. Theatres which received second

run pictures were further grouped on the basis of clearance, some theatres being classed as subject to the 7 days clearance, others to 14 days, and still others to 21 days. Except as to the theatres of Fox West Coast, no theatre placed in a particular position as to run has received pictures from any of the distributors on any better basis, and seldom on any other basis. No theatre except those constructed or acquired by Fox West Coast has moved from an inferior into the first run position.

The system of classification was accompanied by a structure of fixed admission prices for all of the theatres, which were substantially uniform for all theatres in the same run and substantially uniform in differentials between the runs, enforced by the distributors by specifying in their licenses of pictures the minimum prices to be charged by the exhibitors, on pain of immediate termination of the license, reduction in the clearance allowed, relegation of the offending exhibitor to a later run, and refusal of future licenses.

By this process of classification and regimentation of theatres for runs, clearances and admission prices, the Baldwin, although the newest, most modern, spacious and comfortable motion picture theatre in the area, was unanimously denied pictures for first run use and relegated to a second run, subject to 21 days clearance. Upon being denied licenses for first run pictures, petitioner sought to license pictures for second run on 7 days clearance; and, being unanimously denied that, sought the 14 days clearance, which also was unanimously denied. (R. 188-192)

The regimentation of theatres on runs, clearances and admission prices, and the preemption by theatres of the major distributing companies of the first run use of pictures, in the Los Angeles area, was a continuation of the very same conspiracy and monopolization held to be violative of the antitrust laws by this Court in *United States* v. *Paramount*, 334 U. S. 131.

Five final judgments entered against the defendants in that case, were introduced by petitioner as prima facie evi-

dence in support of its complaint, under section 5 of the Clayton Act. The judgments were as follows:

1. A judgment against all respondents, dated December 31, 1946. (Ex. 41, R. 1641; printed also in 70 F. Supp. 72.)

2. A final judgment against the RKO defendants in the government suit, dated November 8, 1948. (Ex. 45, R. 1621.)

3. A final judgment against the Paramount defendants, dated March 3, 1949. (Ex. 46, R. 1621.)

4. A final judgment against Universal Pictures Company, Inc., and Universal Film Exchanges, Inc., dated February 8, 1950. (Ex. 49, R. 1621)

5. A final judgment against Loew's, dated February 8, 1950. (Ex. 48, R. 1541-1542, 1621).

A final judgment against the Fox defendants in the government suit was not entered until June 7, 1951, five days before the start of the trial of this case, and was not in evidence. It prohibits restraint of trade practices and makes extensive theatre divestiture requirements, but in general, gives two years for the divestitures. (CCH 1950-1951 Trade Cases, paragraph 62, 861.)

The district court in this case also received in evidence, as showing more fully the matters adjudicated in the government case, the findings of fact in that case, dated February 3, 1947, and February 8, 1950, as well as the opinion of this Court. (Exs. 41, 42, 43, 44, 47, R. 1536, 1538, 1621; 70 F. Supp. 53; 334 U. S. 131.) Such use of the findings, etc., was approved in *Emich* v. *General Motors*, 340 U. S. 558.

In the *Paramount case* the district court found that respondents had conspired to restrain trade on a nation-wide scale in the distribution and exhibition of motion pictures, and upon those findings entered a judgment prohibiting certain practices by which the conspiracy had been effectuated. The district court, however, denied additional relief requested by the government, namely, that the picture distributing and exhibition businesses of respondents should be separated. But this Court reversed the judgment as to

that denial, and remanded the case for further action on divorcement.

In further proceedings thereupon had by the district court, it received and considered additional evidence on the subject of theatre ownership and divorcement, including evidence relative to changes which had occurred since 1945. The court then found, amongst other things, that the major distributors had extensive theatre holdings throughout the United States, that in cities with over 100,000 population they controlled at least 70 percent of all first run theatres, and in Los Angeles they were most predominantly in control of the first run theatres. (Ex. 47, findings, 147(e), 148.)

Further, the court found that the control of theatres played a vital part in effecting the violations of law, that monopoly power was derived from the theatre control, and actually existed, with the intent and actual exercise thereof to exclude competition; that the theatre control, called vertical integration, was a means of carrying out and powerfully aided the conspiracy to fix runs, clearances and admission prices; and that the predominant position of the major distributors in first run theatres was strongly protected by the system of runs and clearances. (Ex. 47, findings 43(a), 85, 147(a)(b)(d), 148(e)(f)(g)) Some of the specific findings on the subject are as follows:

> The theatre holdings of the major defendants have played a vital part in effecting violations of the Sherman Antitrust Act. (Finding 43(a))
>
> The fixed system of runs and clearances which involved a cooperative arrangement among the defendants was also designed to protect their theatre holdings, safeguard the revenue therefrom, and eliminate competition. The major defendants' predominant position in first-run theatre holdings was strongly protected by a fixed system of clearances and runs. The power to fix clearances and runs which existed and was exercised by the major defendants was in itself a power to exclude independents who were competitors, and was accompanied by actual exclusion. (Findings 85)

All the defendants entered into a horizontal conspiracy to fix prices, runs and clearances which was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integration an active aid to the conspiracy. Vertical integration has furnished an incentive for such conspiracy. (Finding 147(a))

There is close relationship between the vertical integrations and the illegal practices. The vertical integrations were a means of carrying out the restraints and conspiracies. (Finding 147(b))

The percentages of first run theatre ownership and domestic film rentals controlled by the major defendants when coupled with the strategic advantages of vertical integration created a power to exclude competition from the distribution and exhibition markets when desired. (Finding 148(e))

There is substantial proof that monopoly power existed among the eight distributor-defendants who were all working together. Considering that the vertical integrations aided the horizontal conspiracy mentioned in Finding 147(a) at every point, the defendants must be viewed collectively rather than independently as to the power which they exercised over the market by major defendants' theatre holdings. (Finding 147(d))

This power might be exercised either against nonaffiliated exhibitors or distributors, for the ownership, of what was generally the best first run theatres coupled with the possession by the defendants of the best pictures, enabled them substantially to control the market in first run pictures. (Finding 148(f))

There is substantial proof that the intent to exercise the monopoly power existed among the defendants. (Finding 148(g))

As to runs, clearances and admission prices, the judgments in the government case were evidence of the facts found by the court in that case, and that respondents had acted in concert in the formation on a nation-wide scale, including Los Angeles, of a fixed and uniform system of runs, clearances and admission prices for the theatres to which they licensed their films; that independent exhibitors, like

petitioner, when attempting to bargain with respondents for pictures, were met by a fixed scale of clearances, runs and admission prices to which they were obliged to conform; that the system of runs and clearances was designed to protect the theatres of respondents, safeguard their revenue therefrom, and eliminate competition; that the system gave respondents a practical control over the run and clearance status of any theatre, and involved discrimination against persons applying for licenses and seeking runs and clearances for their theatres, because they had no reasonable chance to improve their status by building or improving theatres; and that the purpose and effect of the system was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but solely upon the basis of whether it was operated by one of the respondents. (Ex. 47, findings 79-85(a), 140; Ex. 45 and 46, paragraph 9, R. 3421.)

The district court in the government case then found that—

> Effective relief from the monopoly power of and its exercise by the major defendants cannot be obtained without divorcement. No adequate competition among the defendants or between defendants and independents can exist in the presence of interdependency among the defendants on the one hand to obtain pictures for their own theatres and on the other to obtain theatre outlets for their own pictures. Divorcement is necessary to prevent the major defendants from being in a state of interpendence which too greatly restricts competition. Divorcement is a necessary remedy to introduce competition into defendants' system of fixed admission prices, clearances and runs, and to remove a major incentive to discriminatory trade practices. (Ex. 47, finding 156(b))

On the basis of these findings, judgments requiring divorcement of theatres were from time to time entered by

the district court as to individual groups of the defendants, including respondents. Some of those judgments are enumerated above, page 7.

No divorcement by respondents of the theatres held by them in Los Angeles had occurred prior to the refusals of the distributors to license first run pictures for the Baldwin theatre during 1949 and 1950. The RKO combination throughout the country and as to the Los Angeles theatres was in existence as recently as January 1, 1951, although the divorcement judgment was entered November 8, 1948. (Ex. 45, R. 175-176) The judgment for the Warner divorcement entered January 4, 1951, does not require divorcement before two years thereafter. (CCH 1950-1951 Trade Cases, paragraph 62,765.) The judgment for the Fox divorcement was entered June 7, 1951, but does not require divorcement before two years thereafter. (CCH 1950-1951 Trade Cases, paragraph 62,861.)

The Fox combination, of which respondent Fox West Coast Theatres Corporation was a part, was the second largest aggregation of theatres and the second largest licensee of motion pictures in the United States. It operated 709 theatres throughout the country. (Ex. 42, R. 1535, 1536; *United States* v. *Paramount,* 334 U. S. 131, 150, 167.) About 160 of these were operated in the Los Angeles area by Fox West Coast Theatres. (R. 1207, 1341, 1380, 1382, 2058, 2088.) Fox West Coast was incomparably the largest renter of films in the area, before and during the time laid in the complaint and at the time of trial of this case. Of the total film rental received by four respondents during 1949-1950 from the Los Angeles area, Fox West Coast paid approximately 36 percent—$6,200,508. Information as to the other four distributors is not contained in the record.

From time to time during the trial of this case, the district judge made the following statements, among others of like import: the "antitrust laws are a part of America's romantic dream, which can never be realized in modern economics and actually maintain competition in a modern in-

dustrial system"; "this business, by its very nature, is monopolistic"; "free trade would destroy the industry, because it would destroy the man who makes the pictures, regardless of who gets them"; "I don't conceive that there can be possibility of free trade as to first runs" and "Indeed, a system of 'free trade', as I called it during the trial—i.e., a system which would enable anyone to bid on the same conditions for a first-run would result in a monopoly for those paying the highest prices." (R. 131, 137, 802, 874, 1022, 1707, 1711, 1721, 2235, 2236, 2238, 3978.)

In his written opinion the district judge stated that to recover petitioner must show that the restraint was conspiratorial AND unreasonable. He stated the rule for decision as follows:

> So he who claims to have been injured by such preference must show (a) that the preference was the result of concert of action between the defendants, (b) that it was unreasonable and not based upon the various factors which courts have considered as reasonable considerations entering into the determination . . . and (c) that he has been damaged by such action. (R. 132)
>
> In order to allow recovery, we must be satisfied from the record that the restrictions which the defendants have imposed on the plaintiff are the result of concert of action, and are unreasonable. (R. 134-135; see also R. 802, 874, 1711, 2235-2236, 2388.)

The district judge found that the method of distributing motion pictures disclosed by the evidence was economically necessary and reasonable, i.e., "Such method of distributing motion pictures is reasonable and economically necessary", and "It is economically necessary and is reasonable for a distributor to limit the number of theatres which are licensed to play Los Angeles area first run". (R. 179-180) He found, specifically, that the limitation of first runs to the theatres of respondents was "reasonable" in each case (R. 182-185); that the limitation by Fox of licenses for first run and other preferential use of pictures distributed by it to Fox West Coast Theatres was "reasonable" (R. 188); and

that the control of theatres by Fox West Coast in the Los Angeles area did not constitute a monopoly, i.e.:

> Fox West Coast, through subsidiary corporations, owns and operates a large number of theatres in the Los Angeles area, which theatres are licensed pictures for exhibition on various runs, from first run to late subsequent runs. Such ownership and operation of such theatres does not constitute a monopoly or an attempt to monopolize the exhibition of motion pictures in the Los Angeles area on the part of Fox West Coast (R. 196)

The district court found that the almost perfectly uniform and unanimous action of the distributors, especially in the limitation of first runs to their controlled theatre corporations, and the denials of first run for the Baldiwn theatre, was not the result of conspiracy, but the result of of each individually reacting in a similar manner to general economic and business requirements, and to similar and identical situations. (R. 140-141, 158, 187, 192, 194.) But the economic and business requirements and similar and identical situations were not specifically found or enumerated in the findings or opinion.

While finding that respondents unanimously and contemporaneously refused pictures for first run at the Baldwin theatre, or for second run subject to seven days clearance, or subject to fourteen days clearance, and unanimously granted licenses for twenty-one days clearance, the district court held that the unanimous action as evidence of conspiracy was fully rebutted by general denials of the conspiracy. The court said (R. 134, 135):

> In determining the matter after a complete trial, the question of the burden of proof and of inferences from similar actions becomes academic.
>
> * * * * * * *
>
> Inferences from similarity loses its importance when met by positive denials of such action.

The denials referred to were those of sales employees of Fox, Paramount, and Columbia, who testified merely that they, personally, had no discussion or talk with any other company in determining the run and clearance to which the Baldwin theatre was relegated. (R. 3617, 3467, 3468, 2866)

No attempt was made by respondents to rebut the facts established prima facie by the judgments. The evidentiary effect of the judgments was deemed by the district court to have been overcome by a presumption that the conspiracy of which they were prima facie evidence terminated upon the entry of the judgments. (R. 671-672, 2283-2284, 3072.) The court described that presumption as an "inference that a person against whom a decree has been directed has complied with it, on the assumption that people comply with orders of court. So because of that assumption, therefore, the defendants are entitled, until the case is entirely concluded, that no inference can be drawn of a continuance of facts from their existence then". (R. 677-678, 1597.) Again, "That presumption is that a man follows the law, and that if a man has been under the interdiction of a court, the presumption is that he obeyed the interdiction" (R. 2284).

> I remind you that you are not before the court charged by the government with violating the decree, so you do not have to exculpate yourself. I assume you are entitled to the presumption of innocence and fair dealing, and you are entitled to the presumption that you have complied with the decree. (R. 3072)

Petitioner, through a corporation of which it held all the stock, was until March 17, 1952, the lessee and operator of one of the Paramount first run theatres. It also owned a fifty percent stock interest in another corporation which leased and operated another Paramount first run theatre, located in Hollywood. Petitioner was the only independent exhibitor in the Los Angeles area having any interest in any degree in the first run business.

Partmar Corporation, of which petitioner held all the stock, leased one of the theatres from respondent Para-

mount, and licensed Paramount pictures for first run showing in the theatre. On March 26, 1947, prior to the expiration of the lease, Paramount demanded that Partmar vacate the theatre, and refused any longer to furnish pictures under a contract to expire contemporaneously with the lease. On May 1, 1947, Paramount filed suit to evict Partmar, on the theory that eviction was permissible because of Paramount's own violation of the antitrust laws, as decided in *United States* v. *Paramount*, 66 F. Supp. 323, 70 F. Supp. 52, 334 U. S. 131. The district court, however, denied eviction and held the picture contract had been unlawfully terminated. The opinion in that case is reported in *Paramount* v. *Partmar*, 97 F. Supp. 552. The lease and the picture licenses imposed very heavy theatre and film rental payments on the tenant, based on percentages of the gross receipts of the business, leaving but a very small fraction of the profits to the tenant. The only relationship between the tenant and respondent Paramount was that of landlord and tenant and licensor and licensee of the pictures. On expiration of the lease the tenant surrendered possession, and the theatre and the business were taken over by Paramount. On March 4, 1953, Partmar Corporation filed a petition for certiorari (No. 641) relative to an action under the antitrust laws concerning that transaction.

In 1942 petitioner induced Paramount to furnish pictures for the first run theatre to be located in Hollywood. Paramount was unwilling to do this, however, unless it were given a large ownership in and control of the enterprise. Accordingly, a corporation was organized called Paramount Hollywood Theatre Corporation, and the stock was equally divided between petitioner and respondent Paramount; a theatre was leased by the corporation and Paramount made a contract to furnish pictures for first run use in the theatre to expire in September 1951; and the theatre opened in March 1942. (R. 783, 808, 1310, 1384-1385; Ex. F.) The theatre was operated by petitioner under a contract for management. In March 1947 Paramount also cancelled the

contract for furnishing pictures for that theatre. The judgment in the government case against Paramount (Ex. 46), required Paramount to make a divestiture of the stock held by it in the Paramount Hollywood Theatre Corporation as a means of liberating the corporation from the unlawful control, but as of this time (April 1953) the divestiture has not been made. See *Fanchon & Marco* v. *Paramount*, — F. 2d ——, CA 2, decided March 9, 1953. The only relationship between petitioner and Paramount in this enterprise was that of co-stockholder in Paramount Hollywood Theatre Corporation.

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the district court in this case is in conflict with the opinion of this Court in *United States* v. *Paramount,* 334 U. S. 131. The findings and opinion show that in the Los Angeles area the major picture distributing companies as late as the trial of this case in 1951 were continuing to practice the same system of runs, clearances and admission prices, and allocation of pictures among the exhibitors, the same control of the first run theatres, the same preferential licensing of first run pictures to those theatres and the same discrimination against independents, which were found by the district court and this Court in the *Paramount case* to exist on a nationwide scale, and to be the result of conspiracy.

On facts almost precisely identical with those in the *Paramount case,* the district court in this case has reached a decision precisely the opposite of that in the *Paramount case.* The only difference is one of time, in that this case presents an instance of the application of the same conspiracy to petitioner beginning in 1949, shortly after the decision of this Court in May 1948, and even before the proceedings in the district court on the mandate of this Court had been concluded.

The opinions in the *Chorak case,* 196 F. 2d 225, and in the present case, are the only reported decisions of the Los Angeles district court and of the Court of Appeals for the Ninth Circuit, in motion picture treble damage and injunction cases. The opinion in this case has become a leading authority in the Ninth Circuit, although not an opinion of the Court of Appeals but of the district court, because the Court of Appeals in its opinion in the *Chorak case* has approved and largely used this case as the basis of its own decision.

A decision precisely the reverse of that of this Court in the *Paramount case* was reached in this case by the district court (1) by attributing little or no effect or weight to the judgments in the *Paramount case* as evidence of the

fact that the practices and restraints were the result of conspiracy, (2) by using the judgments to create a supposed presumption that the conspiracy of which they were evidence had been discontinued, (3) by inferring the non-existence of conspiracy from general denials, (4) by inferring that the same uniformity of action among respondents was the result of respondents individually reacting in the same manner to similar economic and business conditions, (5) by concluding that the general denials and the uniformity of action negatived the prima facie effect of the judgments and all the other evidence in the case, and (6) by holding that petitioner could not recover unless the unanimous refusals to furnish pictures were conspiratorial *and* unreasonable *and* injurious to it.

Presumption of discontinuance of conspiracy. Not only has the district court in applying such a presumption robbed petitioner of the real evidentiary effect of the judgments that the conspiracy existed, and of the presumption of its continuance, but it has used the judgments as the basis of a contrary presumption. This not only nullifies the purpose of section 5 of the Clayton Act "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" (*Emich* v. *General Motors,* 340 U. S. 558, 568), but in this case has actually inverted section 5 of the Clayton Act and turned the judgments against the injured private suitor.

There is no presumption that upon the entry of a judgment favorable to the government in an antitrust case, the defendants thereupon ceased their unlawful conduct.

A conspiracy, once established, is presumed to continue until the contrary is shown.

Marino v. *United States,* 91 F. 2d 691, 695, CA 9, 1937.
Coates v. *United States,* 59 F. 2d 173, 174, CA 9, 1932.
Hyde v. *United States,* 225 U. S. 347.

A judgment that parties have violated the antitrust laws does not create a presumption that they have ceased the violation.

Local 167 v. *United States*, 291 U. S. 293, 1934.

In *Local 167*, the defendants in a suit for injunction under the antitrust laws, relied upon a judgment in a preceding criminal prosecution for engaging in the same conspiracy as evidence that they had abandoned the conspiracy before the commencement of the injunction suit. The refusal of the trial court to impute any such effect to the former judgment was affirmed. This Court said (pp. 297-298):

> The conspiracy was not for a temporary purpose but to dominate a great and permanent business. It was highly organized and maintained by the levy, collection, and expenditure of enormous sums. In the absence of definite proof to that effect abandonment will not be presumed.

Conspiracies in restraint of trade, and especially those like that in *United States* v. *Paramount*, are essentially continuous in nature. As said in *United States* v. *Kissel*, 218 U.S. 601, 607-608, 1910:

> A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success.

Unbroken continuity of unlawful restraint and monopoly practiced by respondents for at least the last twenty-five years, is evidenced by numerous proceedings under the antitrust laws, instituted by the government in repeated efforts to enforce competitive conditions in the motion picture business, as well as by private parties to recover damages and injunctive relief. This record of conduct refutes the presumption indulged in by the Trial Judge that the re-

spondents have "obeyed" the interdiction either of the statute or of the judgments, and shows them to be and to have been for many years, incorrigible violators.

A partial list of these proceedings is as follows:

1928— 1. *United States* v. *Paramount Famous Lasky Corp.*, 282 U.S. 30.
1928— 2. *United States* v. *First National Pictures, Inc.*, 282 U.S. 44.
1928— 3. *United States* v. *Balaban & Katz Corp.*, Equity No. 8854, District Court of the United States, Northern District of Illinois, December 15, 1938.
1929— 4. *United States* v. *Fox Theatres Corp.*, S.D. N.Y. Eq. 51-122; consent decree 1931.
1930— 5. *United States* v. *West Coast Theatres, Inc.*, S.D. Cal., Eq. S-10-C, consent decree 1930.
1932— 6. *United States* v. *Fox West Coast Theatres*, S.D. Cal., Eq. Y-38-H, consent decree 1932.
1936— 7. *United States* v. *Warner Bros. Pictures, Inc.*, S.D. N.Y., Eq. 82, 206, 1936.
1936— 8. *United States* v. *Interstate Circuit, Inc.*, 306 U.S. 208.
1939— 9. *United States* v. *Griffith Amusement Company*, Civil 172, W. D. Okla., 334 U.S. 100.
1939—10. *United States* v. *Schine Chain Theatres, Inc.*, 334 U.S. 110.
1939—11. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173.
1940—12. *United States* v. *Barney Balaban et al.*, Criminal No. 31230, December 10, 1940, District Court of the United States, Northern District of Illinois.
1948—13. *United States* v. *Paramount*, 334 U.S. 131.
1950—14. *Milgram* v. *Loew's*, 192 F. 2d 579.

In 1934 the National Recovery Review Board, created by an Executive Order, referring to respondents, reported that "Monopolistic practices in this [motion picture] industry are bold and aggressive and its small enterprise is cruelly oppressed." (*Report of the National Recovery Review Board on the NRA Motion Picture Code*, May 4, 1934,

Clarence Darrow, Chairman; Library of Congress.) In 1934, in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186, this Court was moved to notice this "proclivity for unlawful activity" of these respondents. Again, in 1948, in *United States* v. *Paramount*, 334 U.S. 131, 147-148, the Court adverted to the same "proclivity to unlawful conduct".

General denials. In its opinion, the district court stated: "It was the positive testimony of the sales representatives of all the defendants that other producers or exhibitors were not consulted" (R. 153), and "Inference from similarity loses its importance when met by positive denials of such action." (R. 135) The denials referred to were of no value whatsoever. As few as five film companies controlled the exhibition business in Los Angeles, especially the "cream" first run business—Fox, Loew's, Warner, RKO and Paramount. This concentration made concerted action far from difficult. Five men in New York could, and undoubtedly did, determine who should be admitted to the business in Los Angeles, and upon what basis as to run, availability and otherwise. Respondents' Los Angeles sales employees testified that decisions as to licensing pictures were not made by them, but by company officials at the home offices in New York City. (R. 175-176, 720-723, 1467, 1498, 1765, 3416, 3419, 3461, 3475-3478, 3521, 3523, 3537, 3609.) There was no testimony that they were present or participated in the decisions. With two exceptions, no official of high rank in any of the companies appeared. The RKO sales manager from New York, was one exception. He testified that decisions on licenses were made at the New York RKO office, but gave no further information, and made no denial of concerted action among the companies. The highest ranking officer of Fox West Coast Theatres was the other exception; but he made no denial of concerted action between his company and the other appellees. (R. 3628.)

The only denials of concerted action recorded in the testimony, are those of the Fox sales manager, and of the Los

Angeles branch managers of Columbia and Paramount. They denied merely that they, personally, had any discussion or talk with any other company in determining the 21 days availability to which the Baldwin theatre was relegated. (R. 3617, 3467, 3468, 2866.)

Not only, therefore, did the district court use meaningless denials to rebut concerted action, but it ignored the very strong evidence of concerted action arising from the absence and failure to testify of those who knew and who were obviously the conspirators.

The men who made the denials were, as to licensing pictures, hardly more than glorified correspondence clerks. Their functions were almost wholly confined to the receipt of requests for pictures from exhibitors, the transmission of the requests to the New York offices of respondents; the relaying of the denials to the disappointed exhibitors; the storage, delivery and return of the films, and possibly also the collection of the film rentals from exhibitors.

Denials of concerted action by local sales employees and the absence of the real actors, of those who had authority and were in a position to know, has been the procedure of respondents in similar cases. Of that procedure, in *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-226, 1939, this Court said:

> When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pur-

> suance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.
>
> *Milgram* v. *Loew's,* 192 F. 2d 579, 584, CA 3, 1951.

In *Local 167* v. *United States,* 291 U.S. 293, 298, 1934, the Court said of similar silence by alleged conspirators:

> They were present in court but failed to testify in their own defense. It justly may be inferred that they were unable to show that they had abandoned the conspiracy and did not intend further to participate in it. Under the circumstances of this case their silence rightly is to be deemed strong confirmation of the charges brought against them.

In accepting general denials of conspiracy and a presumption of cessation of conspiracy upon the entry of the judgments in the government case, as full rebuttal of the prima facie evidentiary effect of the judgments, the district court has decided, in effect, that when such judgments have been received in evidence all requisite deference to section 5 of the Clayton Act has been given, and there is no requirement that they be given any evidentiary value as against other evidence. This, of course, vitiates the remedial purpose of the statute.

The truth is, the judgments in the *Paramount case* are of very great intrinsic weight. There can hardly be any question as to the credibility of judgments used as prima facie evidence in a private antitrust suit, as in the case of human witnesses. The judgments in the *Paramount case* were not consent judgments. They were entered after a long, careful, plenary trial, upon voluminous accurate documentary evidence of the conduct of respondents over many years. Respondents enjoyed full opportunity to contest the government suit, in the trial court and in this Court. Numerous mature, industrious and skillful counsel

(the reported opinions enumerate twenty-nine), including leaders of the American bar, defended them. The decisions against them were concurred in by eleven judges of this Court and the district court. That the great intrinsic effect of the judgments could not in reality have been overcome by the rebuttal in this case, is indicated by the fact that had that rebuttal been included in the *Paramount case*, the decisions in that case would not have been changed.

The decision is also in conflict with *Emich* v. *General Motors*, 340 U.S. 558. In that case this Court reversed a decision of the court of appeals which so severely limited the means permissible for ascertaining the particular matters established *prima facie* by a judgment in a government antitrust suit, as to render the judgment of no assistance to the private suitor, thus defeating the purpose of section 5 of the Clayton Act. The decision of this Court clearly implies that such a judgment is not to be reduced, as was done in this case, to merely nominal significance in the private suit.

This nullification of the benefit and authority of the *Paramount* and *Emich cases* and of section 5 of the Clayton Act in the ninth circuit will make it impossible for any motion picture exhibitor injured by reason of the conspiracy and restraint in the Paramount case, to prevail in any suit for damages or injunction, now pending or hereafter instituted in that circuit, against the major picture distributors. To that extent and in a large area of the country, the decision of the district court will vitiate a great public policy. The treble damage section of the Sherman and Clayton Acts and the section for assisting private suitors with judgments in government cases, were enacted as aids in the achievement of the objects of the antitrust laws, and, with suits by the Attorney General for injunction and criminal prosecutions, constitute one of the three principal and co-equal methods provided by Congress for protection of the public against the formidable evils of restraints of trade and monopoly.

Bruce's Juices v. *American Can Co.*, 330 U.S. 743, 751.

So, also, the decision of the district court will make it difficult, probably impossible, to enforce in that circuit the prohibitions of the judgments in the *Paramount case* intended to end the conspiratorial run and clearance system as well as the many other restrictive practices imposed on independent exhibitors.

Individually reacting to similar conditions as the cause of the restraint. It was undisputed that, prior to the entry of the judgments in the *Paramount case,* in the exhibition business at Los Angeles there was and long had been an almost complete limitation of the first run business to respondents; that there was a system of runs, clearances and fixed admission prices for the use of pictures, in which practically every theatre was classified in a fixed position as to run and clearance, and in which in every instance respondents were given the valuable and preferential positions; and that the first run limitation, the system of runs, clearances, and admission prices, had been effected by unanimous refusals of respondents to license pictures on any other basis.

It was undisputed that the same condition existed after the entry of the judgments—the dates thereof being November 8, 1948, March 3, 1949, February 8, 1950, January 4, 1951, and June 7, 1951. Although the conspiracy as to first runs was held unlawful, no injunction as to first runs was entered. As to admission prices, the prohibition was limited to fixing admission prices by contracts for pictures. Moreover, unlawful holdings of theatres, found to be inducements, aids and incentives to the conspiracy and monopoly, and the existence and unlawful use of buying power to suppress competition, although required to be dissolved, were not required to be dissolved until two and five years after the judgments—some not until as late as 1955.

While it was undisputed that the cause of the restraint, prior to the judgment, was conspiracy and monopoly, the

trial judge found that the cause of the same restraint and of the exclusion of the Baldwin, after the judgments, was "fortuitous" and "the result of each distributor defendant individually meeting, on economic and other reasonable grounds, similar situations in a similar manner." (R. 148, 187-188)

That conspiracy should thus cease to be the cause upon entry of the judgments, and that individual action should immediately supplant conspiracy and begin and continue to be the cause thereafter, is incredible! It is more incredible still, when it is realized that, on this theory, the change of causes began as to RKO on November 8, 1948, as to Paramount on March 3, 1949, as to Universal, Loew's and others, in part on February 8, 1950, and in part on January 4, 1951, and as to Fox on June 7, 1951. As the record does not contain the judgment against Fox, strictly speaking, there is no evidence at all of any change as to Fox. Economic phenomena and processes do not occur, move and react to produce results and conditions with any such instantaneous rapidity, but evolve, change and produce new conditions only gradually and over a protracted period. The witnesses who testified that individual action was the cause—Los Angeles local sales employees of respondents—asserted no such change and made no distinction as to the time when conspiracy ceased and individual action began.

This case has its counterpart in *Goldman Theatres* v. *Loew's*, 150 F. 2d 738, 742, CA 3, and *Milgram* v. *Loew's*, 192 F. 2d 579, CA 3, in which Goldman and Milgram were excluded from first runs at Philadelphia and Allentown, by unanimous refusals of respondents, at Philadelphia for the benefit of Warner, and at Allentown to favor a large theatre combination. In the Goldman case the district court held that the exclusion was not caused by conspiracy, but the court of appeals held that the unanimous refusals "could not possibly be sheer coincidence," and reversed the judgment. In the Milgram case, the same court of appeals affirmed findings that the refusals were the result of con-

spiracy, especially when viewed against the background of *United States* v. *Paramount,* 334 U.S. 131, and the "past proclivity" of these respondents to unlawful conduct.

Concurrence of conspiracy and unreasonableness and injury as the rule of decision. If there was a conspiracy to refuse to license pictures to petitioner for first run use in the Baldwin theatre, it was unlawful in and of itself, and the reasonableness of the conspiratorial refusal on the ground of necessity or on so-called economic and business grounds, is immaterial.

United States v. *Paramount,* 334 U.S. 131
United States v. *Schine,* 334 U.S. 110
United States v. *Columbia Steel Co.,* 334 U.S. 495, 522
Bigelow v. *RKO,* 327 U.S. 251
Associated Press v. *United States,* 326 U.S. 1, 11
Fashion Originators' Guild v. *FTC,* 312 U.S. 487, 461, 467-468

The district court in this case said:

> No cases exist which hold that the system, in itself, is a violation of antitrust laws. To the contrary, all the decisions which have come from the higher courts postulate the legality of these restrictions, condemning only unreasonableness in the preferences. (R. 132)

CONCLUSION

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

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